



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 30, 1995

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Office of the Comptroller of Public Accounts
LBJ State Office Building
111 East 17th Street
Austin, Texas 78774

OR95-313

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 31616.

The Comptroller of Public Accounts (the "comptroller") has received two requests for information relating to motor fuel excise taxes. Specifically, the requestor seeks "all public records available involving motor fuel excise tax for the past ten years concerning [certain named] individuals and entities." You advise us that the comptroller will make some of the requested information available to the requestor. You object to release of the remainder of the requested information, however, and claim that sections 552.101, 552.108, and 552.111 of the Government Code except it from required public disclosure.

First, we address your assertion that section 552.101 excepts some of the requested information from required public disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert that section 552.101 in conjunction with section 6103, title 26 of the United States Code excepts the submitted Internal Revenue Service investigation report from disclosure. You also claim that section 552.101 in conjunction with section 111.006 of the Texas Tax Code excepts the submitted comptroller audit report from disclosure.

Section 6103, title 26 of the United States Code renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978); Open Records Decision Nos. 600 (1992), 226 (1979). "Return information" is defined broadly by federal law to include:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C. § 6103(b)(2)(A). Federal courts have interpreted the term broadly to include any information regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). We conclude that the Internal Revenue Service investigation materials fall within section 6103(b) and must be withheld from required public disclosure under section 552.101 of the Government Code.

Next, we address the submitted comptroller audit report. Section 111.006 of the Tax Code provides, in relevant part, that "all information secured, derived, or obtained by the comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer" is confidential. Tax Code § 111.006(a)(2). Exceptions to confidentiality set forth in subsections (b) and (c) do not appear to apply in this instance. We believe that section 111.006 of the Tax Code makes the submitted comptroller audit report confidential. See Open Records Decision No. 624 (1994). Accordingly, we conclude that the comptroller must withhold the submitted comptroller audit report from required public disclosure under section 552.101 of the Government Code.

Finally, we address whether section 552.108 excepts any of the submitted information from required public disclosure. You claim that section 552.108 excepts from disclosure information submitted as files A through F. Section 552.108 excepts:

(a) [a] record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime

(b) [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution

When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2.

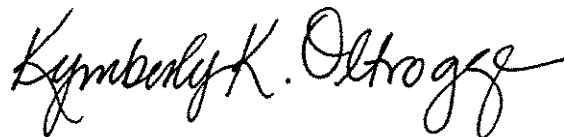
In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Section 552.108 excepts from required public disclosure information related to inactive or closed cases only when release of the information would unduly interfere with law enforcement or prosecution. Open Records Decision Nos. 616 (1993) at 1, 611 (1992) at 2, 216 (1978) at 4.

A case is considered inactive or closed when it has been resolved by a conviction or acquittal, when it has been closed administratively, or when the statute of limitations on the offense has expired. *See* Open Records Decision Nos. 408 (1984) at 7, 372 (1983) at 4. On the other hand, a case under active investigation by *federal* authorities is treated as an active case. Therefore, information relating to an ongoing federal criminal investigation may be withheld under section 552.108 when it is in the possession of a state agency even though the state investigation is inactive or has been discontinued. Open Records Decision Nos. 562 (1990) at 10-11, 340 (1982) at 2.

You advise us that the comptroller's Criminal Investigations Division investigated some of the entities at issue here in cooperation with the Internal Revenue Service. While the comptroller's investigations have been discontinued, the federal charges arising from the investigations are pending. The information submitted as files A through F clearly relates to the pending prosecutions. We conclude, therefore, that the comptroller may withhold files A through F under section 552.108 of the Government Code. As we resolve this under sections 552.101 and 552.108, we need not address the applicability of section 552.111 at this time.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, reading "Kymberly K. Oltrogge". The signature is fluid and cursive, with the first name "Kymberly" and last name "Oltrogge" clearly legible.

Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/GCK/rho

Ref.: ID# 31616

Enclosures: Submitted documents

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(w/o enclosures)